FILED
CLERK, U.S. DISTRICT COURT
MARCH 22, 2004
CENTRAL DISTRICT OF CALIFORNIA
BY s/ DEPUTY

DOCKETED ON CM
MARCH 22, 2004
By s/ 062

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH,	) CASE NO.
	) CV 01-4484-ABC (PJW)
Petitioner,	) REPORT AND
	) RECOMMENDATION OF
v.	) UNITED STATES
	) MAGISTRATE JUDGE
GWENDOLYN	)
MITCHELL, WARDEN	)
Respondent.	)

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 01-13 of the of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Court deny the Petition and dismiss the action with prejudice.

I.
SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In 1997, Petitioner was convicted by a Los Angeles County Superior Court jury of assault on a child causing

death. (Clerk's Transcript ("CT" 480-81.) The trial court sentenced Petitioner to 15 years to life in prison. (CT 483-84.)

Petitioner appealed to the California Court of Appeal, which affirmed the conviction and sentence. (Answer to Petition for Writ of Habeas Corpus ("Answer"), Exhs. A and B.) He then filed a petition for review in the California Supreme Court, which was denied. (Answer, Exhs. C-D.) Petitioner did not seek collateral review in the state courts.

B. Federal Court Proceedings

Thereafter, Petitioner, proceeding pro se, filed a habeas corpus Petition, pursuant to 28 U.S.C. § 2254, and, later, an amended habeas corpus Petition, raising the following claims:

1. There was insufficient evidence to prove that the victim died of shaken baby syndrome.
2. There was insufficient evidence to prove that the victim died while in the "care and custody" of Petitioner.
3. The trial court violated Petitioner's right to effective assistance of counsel and a fair trial.
4. The cumulative effect of the errors at Petitioner's trial violated her right to a fair trial.

(First Amended Petition for Writ of Habeas Corpus ("Petitioner") at 6-7 (including the attached pages hereinafter referred to as 6(1) through 6(34)).)

After Respondent filed an Answer and Petitioner filed a Traverse, the Court appointed counsel for Petitioner. Petitioner's counsel then filed a

Supplemental Memoranda of Points and Authorities in Support of Writ of Habeas Corpus ("Supp. P&A") and a Supplemental Traverse ("Supp. Traverse"). Respondent filed a Supplemental Memorandum of Points and Authorities in Support of Answer to Petition for Writ of Habeas Corpus ("Supp. Answer").

II.

STATEMENT OF FACTS[5/]

This tragic case centers on the death of a seven-week old infant Etzel Smith ("Etzel"), and the conviction of Petitioner, his grandmother, for killing him. On October 10, 1996, Petitioner's daughter, Tomeka Smith ("Tomeka"), gave birth to Etzel. He was her third child. On November 29, 1996, Petitioner, Tomeka, and Tomeka's children spent the day with Petitioner's sister, Renee Townsend, at Townsend's apartment. Townsend's children were also in the apartment that day.

Etzel seemed normal that day, eating well, smiling, and moving his arms and legs. That evening, Tomeka fed Etzel, changed his diaper, washed him, and put him to sleep on his stomach on Townsend's living room sofa around 11:30 p.m. After putting Etzel down, Tomeka went into Townsend's room to listen to music and fell asleep, with the bedroom door ajar.

Townsend left for work when Tomeka put Etzel to

---

5. The facts contained in this section are taken from the appellate court's decision and supplemented with additional facts from the record.

sleep. Petitioner lay down to sleep on the living room floor near the couch where Etzel lay. Tomeka's other two children were also sleeping in the living room. Townsend's children slept in another room in Townsend's apartment that night.

In the early morning hours of November 30, 1996, Petitioner rushed into Townsend's bedroom holding Etzel and woke up Tomeka. Etzel was limp and appeared to have vomit coming out of his nose. Petitioner told Tomeka something was wrong with Etzel and she should call 911.

Firefighters responded to Townsend's apartment, arriving at 3:36 a.m. When they got there, they found Etzel on the bed in Townsend's bedroom. He was dressed and had bright red blood in one nostril. He was warm, but was not breathing and his heart was not beating. The firefighters began cardiopulmonary resuscitation and other efforts to revive him, without success. An ambulance arrived and took Etzel to the hospital, where he was pronounced dead.

In accordance with standard procedure, Etzel's death was initially declared to be from sudden infant death syndrome ("SIDS") because there were no obvious signs of trauma. After an autopsy was completed, however, the coroner concluded that the cause of death was not SIDS, but rather shaken baby syndrome.

On December 5, 1996, a social worker, Linda Reusser, went to the Townsend apartment and told Tomeka and Petitioner that the cause of death had been determined to be shaken baby syndrome. Reusser then asked what had happened on the night Etzel died.

Petitioner told her that Etzel's brother had awakened about 3:20 a.m. and that Petitioner had gone to comfort him. She later went over to the sofa and saw that Etzel was face down. She touched him and he did not respond. Worried, she picked him up and gave him "a little shake, a jostle" to awaken him. Petitioner demonstrated for Reusser described as "a quick jostle," which was a smooth, rather than a jerky motion. Petitioner told Reusser that Etzel's head flopped back when she picked him up and he did not respond to her calls. At that point, Petitioner stopped talking.

Reusser asked Petitioner, "What happened next?" And Petitioner said, "Oh, my God. Did I do it? Did I do it? Oh, my God." Reusser then told Tomeka that she was going to remove her other two children from the home while authorities conducted an investigation into Etzel's death.

Los Angeles police officers interviewed Petitioner on December 9, 1996. In the interview, Petitioner told the officers that Etzel was fine when she went to sleep on the night of November 29. She explained that, early the next morning, one of Tomeka's other sons fell onto Petitioner, waking her. Petitioner then noticed that Etzel needed to have his diaper changed. When Petitioner picked him up, his head flopped back and she noticed he had vomit around his mouth. Petitioner at first told police she shook Etzel ("just a matter of a few seconds"). Petitioner then corrected herself and said that she had twisted him to try to elicit a response.

Tomeka was also interviewed by police. She told them that Petitioner had told her that during the night Etzel had fallen from the couch (a distance of 18 inches)

to the carpeted floor, but had been fine, and so Petitioner had put him back to sleep on the couch.

At trial, in addition to the facts outlined above, the prosecution called two doctors who worked at the coroner's office, both of whom worked on Etzel's autopsy and concluded he had died from shaken baby syndrome. Defendant produced two doctors, one of whom opined Etzel had died from SIDS and another who concluded there was insufficient evidence to determine exactly what caused Etzel's death. In its rebuttal case, the prosecution called a third doctor who also concluded Etzel had died from being shaken.

III.

STANDARD OF REVIEW

The standard of review in this case is set forth in 28 U.S.C. § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2554(d).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided a case differently that the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct f governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Id.* at 413. To merit relief under this clause, the state court decision must be objectively unreasonable, not just incorrect or erroneous. *Id.* at 409-10, 412.[6]

IV.

DISCUSSION

A. Sufficiency of the Evidence; Assault on a Child

In Ground One, Petitioner challenges the sufficiency of the evidence to convict her of committing assault on a child causing death. (Petition at 6-7.) This

---

6. The claims raised in the instant Petition were raised before the California Supreme Court, but that court did not issue a written opinion. Nevertheless, "[w]here there has been one reasoned state judgment rejecting a federal claim, [federal courts are to presume] later unexplained orders upholding that judgment or rejection the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Thus, this Court will consider the reasoning of the California Court of Appeal, which addressed Petitioner's contentions in a written decision, to determine whether the California Supreme Court's decision is contrary to, or an unreasonable application of, federal law.

claim is without merit.

Due process prohibits a person from being convicted of a crime unless he has been found guilty of every fact necessary to establish the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 365 (1970); *Spivey v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999). The United States Supreme Court established in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), that federal habeas corpus relief is not available to a petitioner who claims that the evidence was insufficient to support her conviction unless she can show that, considering the trial record in a light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." This Court must presume, even if it does not affirmatively appear in the record, that the jury resolved any conflicting inferences in favor of the prosecution. *Wright v. West*, 505 U.S. 277, 296-97 (1992); *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000).

Petitioner claims that the medical injuries sustained by Etzel were not consistent with shaken baby syndrome and, therefore, the evidence presented a trial was insufficient to support her conviction. (Petition at 6(1)-6(6); Supp. P&A at 21-43.) Specifically, Petitioner contends that, because there was no evidence of retinal hemorrhaging or significant external injuries, there was insufficient proof that Etzel died from shaken baby syndrome. (Supp. P&A at 21-43.)

> Under California Penal Code § 273ab:
> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable

> person would be likely to produce great bodily injury, resulting in a the child's death . . . [is guilty of assault].

Cal. Pen. Code § 273ab.

There is no dispute that Petitioner was the only adult and the only one awake in the room with Etzel the night he died. There is also no dispute that she picked up Etzel and at the very least shook him to try to rouse him when he appeared to be unconscious. Further, three medical experts testified that Etzel died of shaken baby syndrome. Finally, in at least one interview with authorities after Etzel's death, Petitioner made statements that could be interpreted as admissions of guilt, *i.e.*, "Did I do it?" This is sufficient evidence to convict Petitioner under § 273ab.

In her briefs to this Court, Petitioner cites numerous medical articles and studies which indicate that detectable physical injuries, such as retinal hemorrhaging, bruises, broken bones, and neck trauma, usually accompany a case of shaken baby syndrome. She argues that the government's expert witnesses were not as qualified as Petitioner's. She contends that the Court should reject the opinions of the government's experts and adopt the views expressed by her own. But it is not for this Court in a habeas proceeding to re-examine the medical evidence and determine which evidence the jury should have accepted and which it should have rejected. Nor is it this Court's place to conduct a *de novo* review of the medical literature and decide what that evidence means to the Court. The jury was presented with the medical evidence–both the evidence from the prosecution's three doctors that Etzel died from being shaken and the evidence from

Petitioner's two doctors that the evidence did not establish that Etzel died from being shaken. The jury, apparently, accepted the testimony of the prosecution's experts and rejected the testimony of Petitioner's. This Court is not a liberty to substitute its judgment in place of the jury's based on Petitioner's argument that her version of what happened should have been accepted by the jury. The Court also rejects Petitioner's arguments that the jury should have interpreted the evidence differently or that the medical evidence and literature support a different result.

In rejecting Petitioner's arguments that the evidence was insufficient, however, the Court is not suggesting that it does not recognize what a tragedy this case is. First and foremost, a seven-week old baby was taken from this world without ever having a chance to enjoy the life that he was given. Second, his grandmother now sits in prison serving a 15-years-to-life sentence for causing his death. The evidence in this case, though clearly sufficient to support a conviction, raises many questions. This is not the typical shaken baby case. Grandmothers, especially those not serving as the primary caretakers, are not the typical perpetrators. Further, Petitioner was helping her daughter raise her other children (a 2-year-old and a 14-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there is no evidence that Etzel

was doing anything other than sleeping the night he died. In addition, Petitioner's daughter, Etzel's mother, was in the room next door when Etzel died. The medical evidence was not typical either, in that some of the telltale signs usually found in shaken baby cases did not exist in this case. It was for these reasons that the Court appointed counsel in this case. Yet, despite the commendable effort of counsel, the Court is left with the firm conviction that, under the law governing habeas corpus, Petitioner's conviction is not contrary to the Constitution or the laws of the United States and her Petition must be denied.

B. Sufficiency of the Evidence: Care or Custody of Etzel

In Ground Two, Petitioner claims there was insufficient evidence to prove that Etzel died while in her "care and custody." (Petition at 6(7)-6(13).) The claim is equally unavailing.

Under § 273ab, assault on a child causing death requires that the defendant "have[e] the care or custody of a child" at the time of the assault. Cal. Penal Code § 273ab. The term "care or custody" however, is not defined in the statute. Petitioner argues that she did not have care or custody of Etzel on the day he died, but, instead, that Etzel was in the care and custody of his mother, Tomeka Smith, who was sleeping in the room next door.

The California Court of Appeal concluded that there was "ample evidence" that Etzel was under Petitioner's care and custody at the time of the assault. It found:

> [Petitioner] was the only adult in the living room with Etzel. She cared for him when he

> woke earlier in the night, and she picked him up and examined him when she noticed that he was not well. This is sufficient to satisfy the care and custody element of the offense.

(Answer, Exh. B at 114.) This Court agrees. The evidence was undisputed that Petitioner was the only adult sleeping in the room with Etzel, that Petitioner rocked the baby back to sleep after he awoke in the middle of the night, and that Petitioner picked him up to change his diaper when she noticed Etzel stopped breathing. (RT 262-67, 377-81, 923-26.) Based on this undisputed evidence, a rational jury could have concluded beyond a reasonable doubt that Petitioner had care and custody of Etzel at the time of his death. Accordingly Petitioner is not entitled to habeas relief on this ground.

C. Fairness of the Trial

In Ground Three, Petitioner claims that the trial judge violated her right to effective assistance of counsel and a fair trial by engaging in a "pattern of disparagement" of defense counsel and defense witnesses. (Petition at 6, 6(13), 7.) Petitioner alleges the following 12 acts of impropriety by the trial judge evidenced judicial bias: (1) expressing displeasure at the length of defense counsel's opening statement; (2) correcting defense counsel as to the applicable standard of proof; (3) showing greater impatience with defense counsel than with the prosecutor; (4) refusing to hear defense counsel's arguments in support of an objection; (5) commenting to defense counsel, "I will make the rulings, not you"; (7) commenting to defense counsel, "keep your comments to yourself"; (8) commenting to defense counsel, "you had her leaving for the last 10

minutes. Would you move onto something relevant"; (9) commenting to defense counsel, "you have had her on the witness stand for an hour"; (10) refusing to hear defense counsel's argument on the admissibility of a piece of evidence, calling it "totally improper"; (11) cutting off defense questioning; and (12) bolstering the qualifications of the prosecution's expert witnesses, while simultaneously denigrating equally qualified defense experts. (Petition at 6(16)-6(33).) There is no merit to this claim.[7]

The right to a fair trial is a basic requirement of due process and includes the right to an unbiased judge. *Haupt v. Dillard*, 17 F.3d 285, 287 (9th Cir. 1994) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Furthermore, a judge should endeavor to "avoid even

---

7. Respondent argues that this claim is procedurally defaulted by an independent and adequate state bar– namely, Petitioner's failure to object at trial. (Answer at 19-20.) In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment in the case must clearly and expressly state that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989). Although the California Court of Appeal did state that Petitioner had waived any trial court misconduct claims to which he failed to object, the state appellate court merely noted that Petitioner objected "in some instances, but not in all." (Answer, Exh. B at 114.) The California Court of Appeal did not clarify in which instances Petitioner made a sufficient objection to preserve the issue for appellate review and in which instances the claim had been waived. (Answer, Exh. B at 114.) Under these circumstances, this Court does not find the appellate court's order to be sufficiently clear to warrant a procedural default. *See Valerio v. Crawford*, 306 F.3d 742, 773 (9th Cir. 2002) (holding a procedural default based on an ambiguous order is not sufficient to preclude federal collateral review), *cert. denied sub nom. McDaniel v. Espiredion Valerio*, 123 S. Ct. 1788 (2003).

the appearance of advocacy or partiality." *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974). A judge is, however, "more than a moderator or umpire" and may properly "participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986). A defendant will be denied a fair trial "only if the record discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality." *Id.* (internal quotation marks omitted). The question a court must ask on habeas review is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995).

Here, Petitioner does not suggest and the record does not reflect that the trial judge was actually biased against her and her counsel. Rather, Petitioner contends that the trial judge's disparaging remarks and actions toward defense counsel gave the appearance of partiality, thereby undermining Petitioner's defense. The California Court of Appeal examined each of the 12 alleged acts of impropriety by the trial judge and found no error. (Answer, Exh. B at 114-24.) Although the appellate court noted that a few of the trial judge's remarks expressed "impatience" with counsel and, more properly, should have been done at sidebar, it concluded that the rulings themselves were legally correct and sell within the trial judge's rightful discretion to control the

proceedings. (Answer, Exh. B at 114-24.)

This Court agrees. Several of the trial judge's alleged improprieties were appropriate instances of judicial intervention, necessary to maintain the orderliness of the proceedings. For example, when defense counsel interrupted the judge prior to the court's ruling on a defense objection, the judge properly admonished defense counsel: "I will make the rulings, not you." (RT 811.) Similar acts by the trial judge do not suggest judicial bias or partiality but rather demonstrate the judge's proper control over the proceedings. *See Mostella*, 802 F.2d at 361.

Petitioner also argues that the trial judge's rulings on the admissibility of certain evidence indicate judicial bias. "Judicial rulings alone[, however,] almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Here, Petitioner has not demonstrated that any of the trial judge's rulings were incorrect, let alone indicative of bias.

Similarly, this Court cannot conclude that any disparate treatment of the expert witnesses by the trial judge amounted to a due process violation. For example, after defense counsel was allowed to voir dire Dr. Eugene Carpenter, one of the prosecution's expert witnesses, regarding his qualifications as an expert on shaken baby syndrome, the trial judge commented, "He is certainly qualified as his training." (RT 547-49.) During it rebuttal case, the prosecution proffered another expert witness on shaken baby syndrome, Dr. David Chadwick. After defense counsel was given extensive opportunity to conduct voir fire on Dr.

Chadwick, the trial judge allowed him to testify, stating, "He is well qualified." (RT 1433-38.)

When the prosecutor objected to the qualifications of defense expert Dr. William Goldie, the trial judge stated that his "qualifications . . . [went] to the weight of his testimony." (RT 971.) This comment was not disparaging, but simply informed the jury that Dr. Goldie's experience should be considered in deciding what weight his testimony should carry. After further objection from the prosecutor, the trial judge conducted its own voir dire and subsequently allowed Dr. Goldie to testify as an expert. (RT 971-73.)

In sum, the trial judge's comments about the experts were not improper and did not unfairly prejudice Petitioner.[8] Petitioner's argument to the contrary is rejected.

Finally, the Court notes that the trial judge at times expressed her dissatisfaction with defense counsel regarding the pace of the proceedings. Some of the comments directed toward counsel may have been more appropriately made outside the presence of the jury. Nevertheless, considering the fact that the trial lasted nearly three weeks, this Court is not left with an abiding impression that these isolated comments by the trial judge gave an appearance of advocacy partiality.[9]

---

8. At the conclusion of the trial, outside the jury's presence, the trial judge told Petitioner and her defense counsel that, although he felt Dr. Goldie was not a helpful witness, Dr. Richard Seigler, a second defense expert witness, "was very impressive." (RT 1649.)

9. Opening statements were given on November 12, 1997,

Furthermore, any possible taint caused by the trial judge's comments was overcome by her admonition to the jurors at the close of the trial that they form their own conclusions regarding the evidence, the witnesses, and the guilt of the defendant.[10] Having reviewed the trial record, the Court finds that the trial judge's comments to Petitioner's counsel did not render Petitioner's trial so fundamentally unfair as to violate due process. *See Duckett*, 67 F.3d at 740. Accordingly, as to this claim, Petitioner is not entitled to habeas relief.

D. Cumulative Error

Finally, Petitioner claims that the cumulative effect of the errors in Grounds One, Two, and Three deprived her of due process of law and a fair trial. (Petition at 7.) The cumulative effect of multiple trial errors may prejudice a defendant to the extent that his conviction must be overturned; however, where there is no single constitutional error, as here, "there is nothing to accumulate to a level of a constitutional violation."

---

and closing arguments were given on December 3, 1997. (CT 390, 419.)

10. The jury was instructed as follows:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(CT 468.)

Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002); *see also Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (finding the "collective presence" of "several substantial errors" was prejudicial), *cert. denied*, 537 U.S. 1179 (2003). Because Petitioner has not demonstrated constitutional or substantial error in any of her individual claims, her cumulative error claim fails as well. Accordingly, Petitioner is not entitled to habeas relief.

V.

RECOMMENDATION

For the foregoing reasons, the California courts' denial of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. (d)(1). Accordingly, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation and (2) directing that judgment be entered dismissing the Petitioner with prejudice.

DATED: March 22, 2004.

/s/
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE